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SENATE BILL 806

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

H. Diane Snyder

AN ACT

RELATING TO PUBLIC WORKS; CLARIFYING LANGUAGE REQUIRING CONTRACTORS TO BE REGISTERED; CLARIFYING APPLICABILITY TO USING AGENCIES; SPECIFYING THAT BIDS SUBMITTED BY UNREGISTERED CONTRACTORS OR PRIME CONTRACTORS SHALL NOT BE CONSIDERED FOR AWARD; SPECIFYING THAT BIDS SUBMITTED WITH UNREGISTERED SUBCONTRACTORS SHALL BE CONSIDERED FOLLOWING SUBSTITUTION; SPECIFYING ADDITIONAL REASONS FOR SUBSTITUTION OF NAMED SUBCONTRACTORS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 13-1-105 NMSA 1978 (being Laws 1984, Chapter 65, Section 78, as amended) is amended to read:

"13-1-105. COMPETITIVE SEALED BIDS-- RECEIPT AND ACCEPTANCE OF BIDS.--

A. Bids shall be unconditionally accepted for

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1 consideration for award without alteration or correction,  
2 except as authorized in the Procurement Code. In addition to  
3 the requirement for the prime contractor and subcontractors to  
4 be registered as provided in Section 13-4-13.1 NMSA 1978, bids  
5 shall be evaluated based on the requirements set forth in the  
6 invitation for bids, which requirements may include criteria to  
7 determine acceptability such as inspection, testing, quality,  
8 workmanship, delivery and suitability for a particular purpose.  
9 Those criteria such as discounts, transportation costs and  
10 total or life-cycle costs that will affect the bid price shall  
11 be objectively measurable, which shall be defined by  
12 ~~[regulation]~~ rule. The invitation for bids shall set forth the  
13 evaluation criteria to be used. No criteria may be used in bid  
14 evaluation that are not set forth in the invitation for bids.  
15 A bid submitted by a prime contractor that was not registered  
16 as required by Section 13-4-13.1 NMSA 1978 shall not be  
17 considered for award. A bid submitted by a registered prime  
18 contractor that includes any subcontractor that is not  
19 registered in accordance with that section may be considered  
20 for award following substitution of a registered subcontractor  
21 for any unregistered subcontractor in accordance with Section  
22 13-4-36 NMSA 1978.

23 B. If the lowest responsible bid has otherwise  
24 qualified, and if there is no change in the original terms and  
25 conditions, the lowest bidder may negotiate with the purchaser

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1 for a lower total bid in order to avoid rejection of all bids  
2 for the reason that the lowest bid was up to ten percent higher  
3 than budgeted project funds. Such negotiation shall not be  
4 allowed if the lowest bid was more than ten percent over  
5 budgeted project funds. "

6 Section 2. Section 13-4-13.1 NMSA 1978 (being Laws 2004,  
7 Chapter 89, Section 1) is amended to read:

8 "13-4-13.1. PUBLIC WORKS CONTRACTS--REGISTRATION OF  
9 CONTRACTORS AND SUBCONTRACTORS. --

10 A. Except as otherwise provided in this subsection,  
11 [~~a contractor or subcontractor that submits a bid valued at~~  
12 ~~more~~] in order to submit a bid valued at more than fifty  
13 thousand dollars (\$50,000) in order to respond to a request for  
14 proposals or to be considered for award of any portion of a  
15 public works project greater than fifty thousand dollars  
16 (\$50,000) for a public works project that is subject to the  
17 Public Works Minimum Wage Act, the contractor, serving as a  
18 prime contractor or not, shall be registered with the labor and  
19 industrial division of the labor department. [All tiers of  
20 subcontractors shall be subject to the requirements of this  
21 subsection.] Bidding documents issued or released by a state  
22 agency or political subdivision of the state shall include a  
23 clear notification that [the] each contractor, prime contractor  
24 or subcontractor is required to [register] be registered  
25 pursuant to this subsection. The provisions of this section do

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1 not apply to vocational classes in public schools or public  
2 post-secondary educational institutions.

3 B. The state or any political subdivision of the  
4 state shall not accept a bid on a public works project subject  
5 to the Public Works Minimum Wage Act from a prime contractor  
6 that does not provide proof of required registration for itself  
7 [~~or its subcontractors~~].

8 C. Contractors and subcontractors may register with  
9 the division on a form provided by the division and in  
10 accordance with labor department rules. The division shall  
11 charge an annual registration fee of two hundred dollars  
12 (\$200). The division shall issue to the applicant a  
13 certificate of registration within fifteen days after receiving  
14 from the applicant the completed registration form and the  
15 registration fee.

16 D. Registration fees collected by the division  
17 shall be deposited in the labor enforcement fund."

18 Section 3. Section 13-4-36 NMSA 1978 (being Laws 1988,  
19 Chapter 18, Section 6, as amended) is amended to read:

20 "13-4-36. SUBSTITUTION OF SUBCONTRACTOR. --

21 A. No contractor whose bid is accepted shall  
22 substitute any person as subcontractor in place of the  
23 subcontractor listed in the original bid, except that the using  
24 agency shall consent to the substitution of another person as a  
25 subcontractor in the following circumstances:

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1 (1) when the subcontractor listed in the bid,  
2 after having had a reasonable opportunity to do so, fails or  
3 refuses to execute a written contract, when such written  
4 contract, based upon the general terms, conditions, plans and  
5 specifications for the project involved and the terms of such  
6 subcontractor's written bid, is presented to him by the  
7 contractor;

8 (2) when the subcontractor listed in the  
9 original bid becomes bankrupt or insolvent prior to execution  
10 of a subcontract;

11 (3) when the using agency refuses to approve  
12 the subcontractor listed in the original bid, provided such  
13 approval has been reserved in the bidding documents;

14 (4) when the subcontractor listed in the  
15 original bid fails or refuses to perform his subcontract;

16 (5) when the contractor demonstrates to the  
17 using agency or its duly authorized officer that the name of  
18 the subcontractor was listed as the result of an inadvertent  
19 clerical error;

20 (6) when a bid alternate accepted by the using  
21 agency causes the listed subcontractor's bid not to be low;

22 (7) when the contractor can substantiate to  
23 the using agency that a listed subcontractor's bid is  
24 incomplete;

25 (8) when the listed subcontractor fails or

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1 refuses to meet the bond requirements of the contractor; ~~[or]~~

2 (9) when it is determined that the listed  
3 subcontractor does not have a proper license to perform the  
4 work and the contractor has submitted the name of the  
5 subcontractor along with proof that the subcontractor bid work  
6 for which he was not licensed by the construction industries  
7 division of the regulation and licensing department; or

8 (10) when it is determined by the using  
9 agency, the prime contractor or the director of the labor and  
10 industrial division of the labor department that a listed  
11 subcontractor is not a registered subcontractor on the date  
12 bids are unconditionally accepted for consideration.

13 B. Prior to approval of the contractor's request  
14 for substitution of a subcontractor, the using agency shall  
15 give notice in writing to the listed subcontractor of the  
16 contractor's request to substitute and of the reasons for the  
17 request. The notice shall be served by certified or registered  
18 mail to the last known address of the subcontractor. The  
19 listed subcontractor who has been so notified has five working  
20 days within which to submit written objections to the  
21 substitution to the using agency. Failure to file written  
22 objections shall constitute the listed subcontractor's consent  
23 to the substitution. If written objections are filed, the  
24 using agency shall give at least five working days notice in  
25 writing to the listed subcontractor of a hearing by the using

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1 agency on the contractor's request for substitution.

2 C. No contractor whose bid is accepted shall permit  
3 any subcontract to be voluntarily assigned or transferred or  
4 allow it to be performed by anyone other than the original  
5 subcontractor listed in the original bid without the consent of  
6 the using agency.

7 D. No contractor whose bid is accepted, other than  
8 in the performance of change orders causing changes or  
9 deviations from the original contract, shall sublet or  
10 subcontract any portion of the work in excess of the listing  
11 threshold as to which his original bid did not designate a  
12 subcontractor unless:

13 (1) the contractor fails to receive a bid for  
14 a category of work. Under such circumstances, the contractor  
15 may subcontract. The contractor shall designate on the listing  
16 form that no bid was received; or

17 (2) the contractor fails to receive more than  
18 one bid for a category of work. Under such circumstances, the  
19 contractor may subcontract. The contractor shall state on the  
20 listing form that only one subcontractor's bid was received,  
21 together with the name of the subcontractor. This designation  
22 shall not occur more than one time on the subcontractor list."